Supreme Court, U.S.
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No. 02-203

In The
Supreme Court of the United States

ALEXANDER P. SOMMER
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION BRIEF OF RESPONDENT UNUM LIFE INSURANCE COMPANY OF AMERICA TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The undersigned, counsel of record for UNUM LIFE INSURANCE COMPANY OF AMERICA, certifies that the following listed party has a direct, pecuniary interest in the outcome of this case.

UNUMProvident Corporation

UNUM Life Insurance Company of America

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I. CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reproduced in Petitioner's Appendix ("P's App.") at 1-8 (*Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

The opinion of the District Court denying Petitioner's motion to correct a clerical mistake is reproduced in Petitioner's Appendix at 9-24.

The opinion of the District Court entering judgment in favor of UNUM Life Insurance Company of America ("UNUM") is reproduced in Respondent's Appendix ("R's App.") at 1-10.

II. STATEMENT OF THE CASE AND PROCEEDINGS

Alexander P. Sommer, a securities firm account executive, was an insured under a UNUM group long-term disability plan, established by his former employer Piper Jaffray, Inc. Mr. Sommer was apparently employed by Piper Jaffray from December 1992 through August 1994. After Piper Jaffray terminated Mr. Sommer's employment in August, 1994, he then went to work for Wedbush Morgan Securities. Mr. Sommer was insured under another UNUM group long-term disability plan, established by his next employer, Wedbush Morgan Securities. Mr. Sommer was apparently employed by Wedbush Morgan Securities from August 1994 through January 1996. Despite the fact that Mr. Sommer was employed from 1992 through 1996, he submitted disability claims in 1995 in which he asserted that he was and had been disabled since 1988. (P's App. 10). UNUM denied Mr. Sommer's claim because, among other reasons, he was working full-time during the

period that he claimed that he could not perform all of the material duties of his regular occupation. Mr. Sommer did not appeal the denial of his claim under the Wedbush plan within sixty days, as required by the plan and ERISA. (P's App. 11). The denial of Mr. Sommer's disability claim lead to the ever-reoccurring stream of litigation described below.

Mr. Sommer has litigated this identical disability claim under the same UNUM disability policies[1] in **THREE** separate District Court filings and **FOUR** Ninth Circuit Appeals. In *Sommer I*, the Honorable D. Lowell Jensen granted UNUM's motion for summary judgment regarding Mr. Sommer's disability claims against UNUM under the Wedbush Morgan Securities group long-term disability policy, at issue here. Specifically, as to Mr. Sommer's claim under the Wedbush group policy, Judge Jensen held that his claim was barred for failure to exhaust administrative remedies and granted summary judgment in favor of UNUM. (P's App. 3 & 11).

Mr. Sommer filed a motion for reconsideration of the summary judgment entered against him in *Sommer I*, pursuant to F.R.C.P. Rule 59(a), which was denied by Judge Jensen on August 4, 1997. (P's App. 12). Mr. Sommer did not allege in his motion for reconsideration that there were any clerical errors in the summary judgment. Additionally, Mr. Sommer did not assert in his motion for

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[1] Here, Mr. Sommer only contests the denial of his disability benefits under the Wedbush policy, that was affirmed by the District Courts and the Ninth Circuit on at least six separate occasions. Mr. Sommer is not contesting the denial of his disability claim under the Piper Jaffray policy.

reconsideration that the judgment entered should actually have been a dismissal without prejudice. Instead, Mr. Sommer argued that he should have been excused from exhausting his administrative remedies because exhaustion would have been futile. The District Court rejected Mr. Sommer's argument because plaintiff had every opportunity to raise the futility argument in response to UNUM's summary judgment motion, but failed to do so. Thus, the trial Court would not consider this argument on a motion for reconsideration. Since Mr. Sommer was apparently unsatisfied with Judge Jensen's decision, he appealed *Sommer I* to the Ninth Circuit on August 14, 1997. (P's App. 12).

In addition to filing his appeal of *Sommer I*, on or about August 29, 1997, Mr. Sommer proceeded to refile identical claims for disability benefits with UNUM under the same policies and based upon the same disabilities, which had been previously adjudicated by Judge Jensen and which were now pending before the Ninth Circuit. Mr. Sommer refiled these claims with UNUM based upon the same purported disabilities as had been finally adjudicated by Judge Jensen in *Sommer I*. (P's App. 18).

UNUM responded to Mr. Sommer's refiled August 29, 1997 claims through its attorneys, because of the pending appeal of *Sommer I*. UNUM's attorneys informed Mr. Sommer's attorney that the matter was in litigation, and, therefore, requested that all future communications from Mr. Sommer be directed to UNUM's attorneys, informed Mr. Sommer that any disability claims that he could possibly have had under the UNUM policies had been finally adjudicated by Judge Jensen, and that the policies terminated by their terms when Mr. Sommer completed his employment with Piper Jaffray in August 1994 and

with Wedbush in January 1996. Thus, any claim arising after January 1996 (the termination of the last UNUM policy available to Mr. Sommer) could not possibly be covered by any UNUM policy. (P's App. 19).

On November 13, 1997, Mr. Sommer filed a second action in District Court against UNUM ("*Sommer II*") case number C-97-4159. (P's App. 12). In *Sommer II*, Mr. Sommer contended that he was entitled to benefits under the same UNUM disability policies as a result of the same purported 1988 illness that was the subject of the earlier claim and lawsuit. *Sommer II* alleged claims against UNUM for past disability benefits, future benefits, and breach of fiduciary duty under the same UNUM disability policies based upon the purported August 29, 1997 claim submission to UNUM that was responded to by UNUM's attorneys. (P's App. 12).

On February 17, 1998, UNUM filed and served a Motion to Dismiss *Sommer II* on the grounds that the claims asserted therein had been previously submitted and completely adjudicated in *Sommer I*. In response, Mr. Sommer filed a Motion for Partial Summary Judgment of *Sommer II*, asking the District Court to hold as a matter of law that he was entitled to disability benefits and that UNUM breached its fiduciary duties under ERISA. Mr. Sommer argued that UNUM failed to re-review his re-submitted claim in 1997, and that such failure constituted both grounds for awarding benefits and a breach of fiduciary duty. In UNUM's opposition to Mr. Sommer's motion for partial summary judgment and in UNUM's motion to dismiss, it asserted that Mr. Sommer's claims were barred by the principles of *res judicata*.

The hearing of UNUM's Motion to Dismiss and Mr. Sommer's Motion for Partial Summary Judgment of *Sommer II* occurred on March 23, 1998. At the hearing, Mr. Sommer's counsel conceded that every issue raised in *Sommer II* was raised in *Sommer I*, and was pending before the Ninth Circuit in the appeal of that action.

Judge Armstrong of the District Court issued an Order granting UNUM's Motion to Dismiss and denying Mr. Sommer's Motion for Partial Summary Judgment in *Sommer II*, on March 27, 1998, based upon *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997). Judge Armstrong ruled that she did not have jurisdiction to adjudicate the issues raised in *Sommer II* because all of these claims were already pending before the Ninth Circuit in the appeal of *Sommer I*. Moreover, Judge Armstrong held that, if the court had jurisdiction, Mr. Sommer's claims were barred by *res judicata*. The court further sanctioned Mr. Sommer $1,000 under F.R.C.P. Rule 11. (P's App. 12). Mr. Sommer proceeded to appeal *Sommer II* to the Ninth Circuit. (9th Cir. Case No. 97-16340). (P's App. 12).

On March 24, 1999, after briefing of *Sommer I* and *II* and oral argument, the Ninth Circuit affirmed the ruling in *Sommer I* and held that "Sommer cannot survive UNUM's motion for summary judgment, even under a de novo standard." Further, the Ninth Circuit held that "the district court did not abuse its discretion in declining to consider Sommer's argument that exhaustion of administrative remedies would be futile. Sommer's argument was presented for the first time in a motion for reconsideration following the grant of summary judgment for UNUM and was based on evidence that Sommer had before him at the time of briefing the summary judgment motion." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999).

Additionally, as to *Sommer II,* the Ninth Circuit affirmed the "district court's dismissal of his [*Sommer II*] complaint, summary judgment in favor of UNUM . . . [and affirmed the] denial of Sommer's motion for partial summary judgment." The Ninth Circuit further ruled that Mr. Sommer's claims in *Sommer II* were "barred by the doctrine of *res judicata*." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5382 (9th Cir. 1999).

Then, just as he had done in August, 1997 before filing *Sommer II*, in January, 2000, Mr. Sommer proceeded to attempt to refile with UNUM for a **third time**, the same disability claims based upon the same purported disability, on the same UNUM policies (which had terminated years before). Again, UNUM's counsel informed Mr. Sommer's counsel that his claim had been finally adjudicated by the Ninth Circuit and that his attempt to submit another claim to UNUM, after the matter had been resolved on the merits by the Ninth Circuit, was improper. Mr. Sommer's counsel then filed a third action, *Sommer v. UNUM*, Case #00-1368 SBA ("*Sommer III*"), which is the subject of this Petition for Writ of Certiorari. (P's App. 13).

By refiling his disability claim with UNUM for a **third time** and refiling his lawsuit against UNUM for a **third time**, Mr. Sommer was again merely improperly attempting to circumvent Judge Jensen's, Judge Armstrong's and the Ninth Circuit's prior rulings, which all had become final. In opposing UNUM's motion to dismiss in *Sommer III*, Mr. Sommer attempted to argue, as he has here, that the summary judgment granted in favor of UNUM in *Sommer I* was actually a dismissal without prejudice because the basis of the summary judgment was that he failed to exhaust his administrative remedies under ERISA. Judge Armstrong entered judgment against

Mr. Sommer finding that Judge Jensen's decision of June 17, 1997 granting summary judgment in *Sommer I* was a final judgment on the merits of the same claim that plaintiff raised in *Sommer III*. (P's App. 3). Judge Armstrong dismissed *Sommer III* again based upon the doctrine of *res judicata*.

Further, Judge Armstrong found that the *Sommer III* complaint was frivolous. Sommer's counsel "should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of *res judicata*." (P's App. 5). Judge Armstrong sanctioned Mr. Sommer's counsel $2,500 to serve as a deterrent to further frivolous litigation and awarded UNUM its attorneys' fees. (P's App. 3).

After Judge Armstrong rejected the argument in *Sommer III* that the summary judgment granted in favor of UNUM in *Sommer I* was actually a dismissal without prejudice, true to form, Mr. Sommer filed with Judge Jensen what purported to be a F.R.C.P. Rule 60(a) motion to correct a clerical error in the judgment of *Sommer I*. (P's App. 9). Judge Jensen denied Mr. Sommer's motion finding that the Court granted summary judgment in favor of UNUM in *Sommer I* with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. Further, in finding that the summary judgment issued in *Sommer I* was not a clerical error and that the Order was exactly as the Court intended, the Court stated as follows:

> The Court finds that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a

> separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985), [cases that supported the issuance of summary judgment for failure to exhaust administrative remedies].

(P's App. 22).

Thereafter, Mr. Sommer filed two notices of appeal, one appealing Judge Jensen's Order denying his motion to correct a clerical mistake and the other appealing Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata*. Mr. Sommer's counsel also appealed the $2,500 Rule 11 sanction award and the award of attorneys' fees against him issued by Judge Armstrong in *Sommer III*.

The Ninth Circuit affirmed the Order denying Mr. Sommer's motion to correct a clerical mistake and Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata*. Those rulings are the subject of this Petition for Writ of Certiorari. Additionally, the Ninth Circuit affirmed the $2,500 Rule 11 sanction award and the award of attorneys' fees against Mr. Sommer's counsel issued by Judge Armstrong in *Sommer III*. See *Sommer v. UNUM*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

III. REASONS FOR DENYING THE WRIT

Beginning in the mid-1990s, Alexander Sommer sought disability benefits under policies he obtained

through his employer, Wedbush. Following denial of benefits by UNUM, he sued in federal court. The Ninth Circuit's consideration of Sommer's last Ninth Circuit appeal was the fifth given to his case in the federal courts. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002). This Petition for Writ of Certiorari amounts to Sommer's sixth foray into the federal courts on the same disability claim.

District Court Judge Jensen issued a final judgment in *Sommer I.* The Ninth Circuit affirmed the summary judgment. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173570, 1999 U.S. LEXIS 5388 (9th Cir. 1999). Sommer filed his claim with UNUM again. His claim was for the same disability under the same policy, so UNUM rejected it again. Following this second rejection, Sommer filed his second suit in federal district court. In *Sommer II,* District Judge Armstrong dismissed the case based on lack of jurisdiction because *Sommer I* was pending before the Ninth Circuit and also imposed $1,000 in Rule 11 sanctions. She noted that even if the court did have jurisdiction, *Sommer II* would be barred by *res judicata* as a result of *Sommer I.* The Ninth Circuit agreed, affirming on *res judicata* grounds. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173592, 1999 U.S. LEXIS 5382 (9th Cir. 1999). After yet another rejection of the same disability claim by UNUM, Sommer brought a third suit, again in Judge Armstrong's court. The district court dismissed *Sommer III* on *res judicata* grounds. The district court also imposed $2,500 in Rule 11 sanctions and assessed attorneys' fees and costs against Sommer's attorney pursuant to 29 U.S.C. § 1132(g)(1).

Sommer appealed the *Sommer III* decisions, as well as Judge Jensen's refusal to amend his final judgment in

Sommer I per Sommer's Rule 60(a) motion. The Ninth Circuit affirmed the *Sommer III* district court's decision in all respects and affirmed the *Sommer I* court's denial of Sommer's Rule 60(a) motion for correction of a clerical mistake. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

This Petition for Writ of Certiorari purportedly seeks the review of the Ninth Circuit's ruling affirming *Sommer III*. However, the "Question Presented" by Sommer herein – "Did the Court of Appeals for the Ninth Circuit commit judicial error by concluding that in an ERISA case a beneficiary under a long-term disability plan is barred by the doctrine of *res judicata* from filing a second lawsuit to enforce his or her entitlement to benefits, after subsequently exhausting his or her administrative remedies?" – was not at issue in *Sommer III*. Accordingly, this Court must reject Sommer's Petition because Sommer does not have standing to raise the issue presented.

If Sommer wished to dispute District Court Judge Jensen's issuance of a final judgment, instead of a dismissal without prejudice, in *Sommer I*, he needed to raise that issue in the appeal of *Sommer I*. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173570, 1999 U.S. LEXIS 5388 (9th Cir. 1999). He did not. He is now foreclosed from doing so by the doctrine of *res judicata*. Sommer cannot avoid the doctrine of *res judicata* by simply refiling his action over and over again.

The only issues that Mr. Sommer can challenge in this Petition for Writ of Certiorari are the Ninth Circuit's affirmance of Judge Armstrong's ruling in *Sommer III* that the action was barred by the doctrine of *res judicata* and Judge Jensen's denial of Mr. Sommer's purported Rule

60(a) motion. Sommer has not raised that issue and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

1. *SOMMER III* WAS BARRED BY THE DOCTRINE OF *RES JUDICATA*

The Ninth Circuit has long recognized that summary judgment affects substantive rights. See *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636, 637 n.1 (9th Cir. 1953). While a complaint that is sought to be dismissed under Rule 12(b)(6) can often be amended, see, e.g., *Foman v. Davis*, 371 U.S. 178, 182, (1962); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2713 (2d ed. 1983), a grant of summary judgment is a final adjudication on the merits. See *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) citing *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4444 (1981). The *Griffith* Court explained that the disposition of a case on summary judgment grounds represents a final adjudication on the merits and forecloses subsequent litigation of the matter. See *Griffith*, 772 F.2d at 825.

Here, although Mr. Sommer characterizes Judge Jensen's ruling in *Sommer I* as a dismissal, the facts establish that summary judgment was entered in favor of UNUM. (See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388, *2, (9th Cir. 1999) "Alexander P. Sommer ("Sommer") appeals from the district court's summary judgment in favor of UNUM Life Insurance Company ("UNUM") and the Paul Revere Life Insurance Company ("Paul Revere"). We have jurisdiction under 28 U.S.C. § 1291 and we affirm."). Moreover, this fact was confirmed again by Judge Jensen, when

he denied Mr. Sommer's purported F.R.C.P. Rule 60(a) motion to correct a clerical error in the judgment of *Sommer I*. (P's App. 9). Judge Jensen denied Mr. Sommer's motion finding that the Court granted summary judgment in favor of UNUM in *Sommer I* with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. Further, in finding that the summary judgment issued in *Sommer I* was not a clerical error and that the Order was exactly as the Court intended, the Court stated as follows:

> The Court finds that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985), [cases that supported the issuance of summary judgment for failure to exhaust administrative remedies].

(P's App. 22).

Accordingly, Judge Jensen's disposition of *Sommer I* on summary judgment grounds represented a final adjudication on the merits.

For the same reasons that the Ninth Circuit decided that *Sommer II* was barred by the doctrine of *res judicata*, *Sommer III* was also barred. In making its finding that *Sommer II* was barred by the doctrine of *res judicata* the Ninth Circuit stated as follows:

Sommer's claims are barred by the doctrine of res judicata. Res judicata bars the relitigation of claims raised (or that could have been raised) and adjudicated in a prior lawsuit involving the same parties. *Costantini v. Trans World Airlines,* 681 F.2d 1199, 1201 (9th Cir. 1982). Whether a suit involves the same "claim" as an earlier suit is determined by looking at four factors:

"(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 1201-02 (quoting *Harris v. Jacobs,* 621 F.2d 341, 343 (9th Cir. 1980)). The fourth factor is the most important. 681 F.2d at 1202.

This case and Sommer's prior lawsuit, *Sommer v. UNUM Life Ins. Co.,* 1999 U.S. LEXIS 5388, No. 97-16564, also pending before this Court, arise out of the same transactional nucleus of facts: Sommer's brain surgeries in 1988 and 1989; Sommer's application for disability benefits from the Paul Revere Insurance Company ("Paul Revere"); Paul Revere's denial of benefits; Sommer's application for disability benefits from UNUM; and UNUM's denial of benefits. Both of Sommer's lawsuits involve the same parties – Sommer, UNUM, and Paul Revere – and the same claim – wrongful denial of disability benefits under ERISA. Sommer's complaint in each case alleges the same disability, the same cause of disability, and the same alleged right to disability benefits under the same

> disability policies. The other three factors also establish that Sommer's second suit involves the same "claim" as his prior suit: prosecution of Sommer's second action would impair the rights established in the prior judgment that UNUM and Paul Revere did not violate ERISA in denying Sommer benefits, substantially the same evidence is presented in the two actions, and the two suits involve infringement of the same right – to recover benefits payable from a benefits plan covered by ERISA.
>
> Sommer argues that he has stated a cause of action different from that raised in his first suit because his current cause of action is based upon "new" medical evidence, reports not considered by UNUM and Paul Revere in denying benefits. Although Sommer labels the evidence "new," this evidence was submitted by Sommer in the prior case in a motion to "augment the administrative record" before the plan administrator. The district court denied that motion and the district court's ruling is an issue in the appeal of Sommer's first suit. Allowing Sommer to proceed with his second suit would circumvent the district court's ruling in that case.
>
> Sommer also argues that his current action is not subject to the doctrine of res judicata because it is a claim for benefits under ERISA. No ERISA case from this Court or any other has carved out such an exception to the rules of procedure and we decline to adopt such a rule. We affirm the district court's dismissal of Sommer's complaint on the ground of res judicata.

Here, again, *Sommer III* and *Sommer I & II* arise out of the same transactional nucleus of facts: Sommer's surgeries in 1988 and 1989; Sommer's application for

disability benefits from UNUM; and UNUM's denial of benefits. All three of Sommer's lawsuits involve the same parties – Sommer and UNUM – and the same claim – purported wrongful denial of disability benefits under ERISA. Sommer's complaint in each of the cases alleges the same disability, the same cause of disability, and the same alleged right to disability benefits under the same disability policies. The other three factors also establish that *Sommer III* involves the same "claim" as his prior suits: prosecution of *Sommer III* would impair the rights established in the prior judgments which were upheld by the Ninth Circuit that UNUM did not violate ERISA in denying Sommer benefits, substantially the same evidence is presented in the three actions, and the three suits involve infringement of the same right – to recover benefits payable from a benefits plan covered by ERISA.

In *Sommer III*, Mr. Sommer made another erroneous claim that he had stated a cause of action different from those raised in *Sommer I & II* because he had now purportedly exhausted his administrative remedies and had a new cause of action based on an alleged denial of disability benefits by UNUM on or about March, 2000. This same allegation was made and rejected in *Sommer II*. Mr. Sommer cannot create a new cause of action by resubmitting a claim under a policy which he acknowledges has long since terminated. This alleged claim is a fiction created by Mr. Sommer and is simply the refiling for a third time of his previously finally adjudicated disability claims with UNUM. All of Mr. Sommer's claims arise from the same disability policies and all claims which could have arisen from those disability policies were previously fully, fairly and finally adjudicated. What Mr. Sommer continues to fail to acknowledge is that the judgment

entered and affirmed in *Sommer I* is a final adjudication on the merits of all of his claims. Once the summary judgment was entered he no longer had any administrative remedies to exhaust. Again, allowing Mr. Sommer to pursue the same claims that were previously resolved both at trial and on appeal in *Sommer III* would circumvent the District Courts' and the Ninth Circuit's rulings in *Sommer I* and *II*.

Under federal law, a party cannot avoid the bar of *res judicata* merely by alleging conduct not previously alleged in their prior suit, nor can a party avoid the bar of *res judicata* by pleading a new legal theory. *Lester v. NBC*, 217 F.2d 399, 400 (9th Cir. 1954), cert. denied, 348 U.S. 954, 75 S. Ct. 444, 99 L. Ed. 746 (1955); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 807, 46 L. Ed. 2d 657 (1976). A review of the pleadings of *Sommer I*, *Sommer II*, *Sommer III*, the District Court's Orders, *Sommer v. UNUM*, 1999 U.S. LEXIS 5382 (9th Cir. 1999), *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999) and *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002) conclusively establish that *Sommer III* is merely a regurgitation of the prior actions and an attempt to undermine Judge Jensen's, Judge Armstrong's and the Ninth Circuit's rulings and, as such, Mr. Sommer's present claim is barred by the doctrine of *res judicata*.

The doctrine of *res judicata* "is motivated primarily by the interest in avoiding repetitive litigation, conserving judicial resources, and preventing the moral force of court judgments from being undermined." *International Union of Operating Engineers-Employers Construction Industry Pension, Welfare and Training Trust Funds v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (citation omitted). *Sommer*

III violates principles of *res judicata*, is frivolous and such conduct should not be tolerated by this Court. Judicial resources have been and continue to be wasted by Mr. Sommer's and his attorney's spurious tactics. Under Mr. Sommer's repetitive litigation theory, every matter once finally adjudicated would be subject to endless re-litigation until the matter was resolved to Mr. Sommer's satisfaction. No legal system could function applying Mr. Sommer's rules, and the Federal Court system definitely does not follow Mr. Sommer's rules. Accordingly, the Ninth Circuit's affirmance of Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata* is correct. As such, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

2. *SOMMER I* WAS A FINAL DECISION ON THE MERITS

While *Sommer III* was pending before Judge Armstrong, Mr. Sommer filed a motion with Judge Jensen pursuant to Rule 60(a) to correct a purported clerical error in *Sommer I*. In it, Mr. Sommer argued that Judge Jensen's designation of his final order in *Sommer I* as a "summary judgment" rather than a "dismissal judgment" was a clerical error. In his denial of Mr. Sommer's Rule 60(a) motion, Judge Jensen made clear that there was, in fact, no clerical error: he intended his June 17, 1997 order in *Sommer I* to be a summary judgment, and not a dismissal without prejudice.

The Ninth Circuit affirmed the denial of the Rule 60(a) motion. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177. Further, the Ninth

Circuit confirmed that the Rule 60(a) motion failed because the Rule "only applies during the pendency of an appeal. By the time Sommer filed his Rule 60(a) motion, the *Sommer I* appeal had been over for nearly two years." (P's App. 8). This further illustrates that if Mr. Sommer wished to contend that the Order of summary judgment in *Sommer I* should have been a dismissal without prejudice, he needed to raise that argument in *Sommer I*. *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999). He did not. Therefore, as explained above, he is forever precluded from raising that argument because of the doctrine of *res judicata*.

3. SUMMARY JUDGMENT IS AN APPROPRIATE ACTION WHERE A PLAINTIFF HAS FAILED TO EXHAUST ERISA ADMINISTRATIVE REMEDIES

Mr. Sommer failed to appeal the denial of his disability claim within the sixty day time period provided under ERISA and expressly stated in the UNUM denial letter and policy. Accordingly, after the sixty day time period for administrative appeal expired without Mr. Sommer requesting an appeal, it was impossible for Mr. Sommer to ever exhaust his administrative remedies because he had failed to request a timely appeal of the denial of his disability claim. In *Sommer III*, Judge Armstrong confirmed this point as follows:

> Plaintiff argues that his claim in the instant case is not barred by *res judicata* because he has finally exhausted his administrative remedies under the UNUM policy by appealing the initial denial of his claim for benefits. He argues that Judge Jensen's finding that plaintiff failed to

> exhaust his administrative remedies is not a final judgment on the merits. It is undisputed, however, that plaintiff failed to appeal the initial denial of benefits with UNUM's Quality Review Board within 60 days, as required by the terms of the plan. Therefore, plaintiff had failed, and was unable, to exhaust his administrative remedies under the disability policy. This Court is not free to rewrite the terms of the Wedbush policy to permit plaintiff's appeal of the initial denial of his claim nearly four years after it was denied. Judge Jensen's decision granting summary judgment was a final judgment on the merits of the same claim that plaintiff raises here today.

(R's App. 6-7).

Further, the sixty day time bar in which a claimant must file their request for appeal under an ERISA plan was affirmed by the Ninth Circuit in *White v. Jacobs Eng'g Group*, 896 F.2d 344, 349 (9th Cir. 1989). Mr. Sommer's contentions that *Sommer I* should have resulted in a dismissal without prejudice and that he has subsequently exhausted his administrative remedies are both completely spurious and irrelevant. When Mr. Sommer chose not to request an appeal with UNUM Life Insurance Company of America of the initial decision to deny his disability claim, he chose not to exhaust his administrative remedies and he cannot change those facts.

The Ninth Circuit affirmed Judge Jensen's ruling in *Sommer I* and held that "Sommer cannot survive UNUM's motion for summary judgment, even under a de novo standard." Further, the Ninth Circuit held that "the district court did not abuse its discretion in declining to consider Sommer's argument that exhaustion of administrative remedies would be futile. Sommer's argument was

presented for the first time in a motion for reconsideration following the grant of summary judgment for UNUM and was based on evidence that Sommer had before him at the time of briefing the summary judgment motion." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999). Now, Mr. Sommer contends that Judge Jensen erred in granting UNUM's motion for summary judgment in *Sommer I* and in not ordering a dismissal without prejudice. Mr. Sommer does not mention that he did not contend or request that the Court Order a dismissal without prejudice during the trial Court proceedings and/or appellate proceedings in *Sommer I* and *II*.

Judge Jensen's grant of summary judgment in *Sommer I* was based upon binding authority that stated under ERISA, summary judgment should be entered, not a dismissal without prejudice, when a claimant fails to exhaust their administrative remedies, as such an action is barred. The purpose of the requirement to exhaust administrative remedies is to alleviate the need for federal courts to make initial claims determinations as well as to allow for the establishment of a record for review by the courts. Indeed, the Ninth Circuit has required that a beneficiary exhaust this plan review process *before* bringing suit, recognizing the exhaustion of administrative remedies requirement as a "matter of sound policy." The Ninth Circuit also recognizes that the failure to exhaust administrative remedies prior to filing suit serves as a bar to the action and results in a binding appealable judgment, not a dismissal without prejudice. See, *e.g.*, *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). Under ERISA, a claimant must exhaust a plan's internal review procedures, described above, prior to bringing suit in federal

court. *Pengilly v. The Guardian Life Insurance Co. of America*, 81 F.Supp.2d 2010, 1023 (N.D.Cal. 2000); *Diaz v. United Agriculture Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995).

In *Diaz* and *Pengilly*, all actions governed by ERISA, summary judgment was entered against plaintiffs because their actions were barred due to their failure to exhaust their administrative remedies under ERISA. Further, the Ninth Circuit affirmed the entries of summary judgment in *Diaz* and *Pengilly*.

Mr. Sommer improperly contended in *Sommer III*, for the first time, contrary to clear Ninth Circuit precedent, that his failure to exhaust administrative remedies under ERISA should have resulted in a dismissal without prejudice and that, therefore, the entry of summary judgment in *Sommer I* was improper. Clearly, as discussed above, Mr. Sommer's contention is not one that could be advanced in *Sommer III* because of the doctrine of *res judicata*. Be that as it may, Mr. Sommer's contention in that regard is incorrect.

None of the cases cited by Mr. Sommer are governed by ERISA and, as a result, are completely inapplicable to the case at bar. The Ninth Circuit has ruled that a claimant's failure to exhaust his administrative remedies under ERISA results in his action being barred and subject to a summary judgment being entered against the claimant. *See, e.g., Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). Judge Jensen's granting of summary judgment for UNUM in *Sommer I* was based upon sound binding legal authority and was correct.

Further, in *Sommer III*, the Ninth Circuit correctly confirmed that "summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies." (P's App. 4). Citing *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust,* 50 F.3d 1478, 1480 (9th Cir. 1995); *Sarraf v. Standard Ins. Co.,* 102 F.3d 991, 992 (9th Cir. 1996).

IV. CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER P. SOMMER,
Plaintiff,
v.
UNUM LIFE INSURANCE,
Defendant.
_____/

No. C 00-01368 SBA
ORDER
(Filed Jan. 8, 2001)

INTRODUCTION

This matter comes before the Court on defendant's motion to dismiss, or in the alternative for summary judgment, and motion for Rule 11 sanctions. Having read and considered all the papers filed in connection with these motions, having considered the arguments advanced by the parties and being fully informed, the Court GRANTS defendant's motion for summary judgment [# 6-1] and GRANTS defendant's motion for Rule 11 sanctions [# 9-1].

BACKGROUND

I. Undisputed, Material Facts

Plaintiff Alexander P. Sommer was employed as an account executive for Henry F. Swift & Co. ("Swift"), a securities firm, from November 1988 through December 1992. In January 1993, Swift merged with Piper Jaffray, Inc. ("Piper"). Plaintiff continued to work as an account executive for Piper until he was fired in August 1994 for

lack of production. Approximately one month later, plaintiff obtained employment as an account executive with Wedbush Morgan Securities ("Wedbush"), where he worked until January 1996. Plaintiff voluntarily left Wedbush after being diagnosed by his neuropsychologist with an organic brain disorder attributable to previous surgeries. While plaintiff worked for Piper and Wedbush, he was covered by a long-term disability policy issued by defendant UNUM Life Insurance Company of America.

Plaintiff underwent three separate brain surgeries in 1988 and 1989. He alleges that as a result of the surgeries, he was totally disabled by organic brain deficits during the times he worked for Swift, Piper, and Wedbush. In September 1994, Plaintiff filed a claim for disability benefits with UNUM payable under the terms of the Piper policy. UNUM rejected plaintiff's claim on July 10, 1995 on the ground that plaintiff was not disabled under the terms of the policy. Defendant reviewed its determination on appeal, and determined that plaintiff was in fact disabled as early as January 1, 1993. Nonetheless, it still determined that plaintiff was ineligible for benefits because of a policy exclusion for pre-existing conditions.

On January 26, 1996, plaintiff filed another disability claim with UNUM under the Wedbush policy. That claim was also denied on April 24, 1996, on the ground that plaintiff was not disabled under the policy. Plaintiff failed to appeal this determination.

II. Procedural History

Plaintiff filed a First Amended Complaint on September 6, 1996, alleging causes of action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. §§ 1001, *et seq.*, against UNUM, the Paul Revere Life Insurance Company, and the administrators of his disability insurance plans (hereinafter, "*Sommer I*"), Case No. C 96-2407 DLJ. Defendant UNUM moved for summary judgment on three issues: (1) standard of review; (2) scope of review; and (3) liability.

On June 17, 1997, Judge Lowell Jensen of the Northern District of California granted defendant's motion. The court concluded that UNUM did not abuse its discretion in denying benefits under the Piper policy. As to the Wedbush policy, the court found that plaintiff had failed to exhaust his administrative remedies since he did not appeal the denial of benefits to defendant's Quality Review Section, as required by the terms of the policy. Plaintiff appealed the district court's grant of summary judgment on August 14, 1997.

On or about August 28 and 29, 1997, plaintiff filed new claims for disability benefits with UNUM under the Piper and Wedbush Policies, respectively.[1] On November 13, 1997, plaintiff commenced a new action ("*Sommer II*") before this Court, Case No. C 97-4159 SBA. In the *Sommer II* complaint, plaintiff adopted the substance of his first amended complaint from the previous action. (Pl. Exhs. D, F)[2] Again, UNUM moved for summary judgment. On

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[1] The parties agree that plaintiff's claims of August 28 and 29, 1997 were denied, though neither party presents evidence of the reasons for the denial.

[2] The main differences are that the new complaint contains dates to reflect a different request for benefits and denials by UNUM; allegations that UNUM denied benefits without conducting any review and a prayer for punitive damages.

March 31, 1998, this Court granted defendant's motion on the grounds that the same issues raised in *Sommer II* were also raised in *Sommer I*, and *Sommer I* was on appeal before the Ninth Circuit. The pending appeal divested this Court of jurisdiction to hear the matter. Moreover, the Court concluded that even if it had jurisdiction over the matter, the issues raised in the complaint were fully adjudicated in the prior action, and plaintiff's claims were therefore barred by the doctrine of *res judicata*. (Pl. Exh. J) The Court also granted a co-defendant's motion for Rule 11 sanctions in the amount of $1,000 against plaintiff. Plaintiff appealed this Court's order granting summary judgment.

On March 24, 1999, the Ninth Circuit affirmed judgments in *Sommer I* and *Sommer II*. As to *Sommer I*, the Ninth Circuit first held that plaintiff's claims could not survive defendant's motion for summary judgment even if the claim denial were subject to a de novo standard of review.[3] It agreed that plaintiff's claim was barred by the pre-existing condition provision of UNUM's policy, and it held that the district court did not abuse its discretion in declining to consider plaintiff's argument that exhaustion of administrative remedies would be futile. With respect to *Sommer II*, the Ninth Circuit held that this Court properly dismissed plaintiff's complaint on the ground of *res judicata*.[4]

On April 20, 2000, plaintiff filed a third complaint against UNUM ("*Sommer III*"). In *Sommer III*, plaintiff

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[3] *See* Pl. Exh. I.

[4] *See* Pl. Exh. H.

again seeks damages for an unlawful denial of benefits under ERISA. He alleges that he has been totally disabled as a result of brain surgeries in 1988, and that this disability existed during the time period he was employed by Wedbush. He also alleges that on or about February 1996, he filed a claim for disability benefits payable under the terms of the Wedbush policy, and that on or about March 2000, UNUM rejected his claim.

DISCUSSION

I. Res Judicata

Defendant argues plaintiff's claim for disability benefits under the Wedbush policy is barred by the doctrine of *res judicata*. A claim is precluded under the doctrine of *res judicata* if it involves the same "claim" as a prior suit, on which a final judgment on the merits was reached, and it involves the same parties or their privies. *Nordhom v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993); *see also Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

The Court finds there to be no genuine dispute that each of the elements of *res judicata* is met in this case. First, plaintiff's claim for disability benefits in this case is the same claim as that asserted by plaintiff against defendant in *Sommer I* and in *Sommer II*. Namely, it is a claim for disability benefits under the UNUM group disability insurance policy issued to plaintiff's former employer, Wedbush Morgan Securities, for the period of September 1994 through January 1996, for an allegedly

disabling condition involving plaintiff's brain that began in November 1988. Second, Judge Jensen granted summary judgment to UNUM on this same claim for disability benefits on the ground that plaintiff had failed to exhaust his administrative remedies. Summary judgment is a final judgment on the merits. *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998). This Court also granted summary judgment to defendant on this claim, in part, on the basis that Judge Jensen's adjudication of this claim rendered it *res judicata*. The Ninth Circuit affirmed the decisions of Judge Jensen and this Court. And, third, plaintiff and defendant were parties to all three cases.

Plaintiff argues that his claim in the instant case is not barred by *res judicata* because he has finally exhausted his remedies under the UNUM policy by appealing the initial denial of his claim for benefits. He argues that Judge Jensen's finding that plaintiff failed to exhaust his administrative remedies is not a final judgment on the merits. It is undisputed, however, that plaintiff failed to appeal the initial denial of benefits with UNUM's Quality Review board within 60 days, as required by the terms of the plan. Therefore, plaintiff had failed, and was unable, to exhaust his administrative remedies under the disability policy. This Court is not free to rewrite the terms of the Wedbush policy to permit plaintiff's appeal of the initial denial of his claim nearly four years after it was denied. Judge Jensen's decision granting summary judgment was

a final judgment on the merits of the same claim that plaintiff raises here today.[5]

II. Sanctions

Defendant also moves for Rule 11 sanctions.[6] Rule 11 imposes a duty on attorneys to certify that all pleadings are legally tenable and well-grounded in fact. *Primus Automotive Fin. Services, Inc. v. Batarese*, 115 F.3d 644, 648 (9th Cir. 1997).[7] Plaintiff's counsel filed a frivolous complaint. He should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of *res judicata*.

Under Rule 11, the sanction imposed may consist of "an order directing payment to the movant of some or all

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[5] *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983), cited by plaintiff, is inapposite. There, the Ninth Circuit observed in a footnote that, although it found no California cases on point, "it appears that California courts would conclude that a denial of a writ of mandamus for failure to exhaust administrative remedies is not a decision on the merits." This statement is dictum concerning a matter of state law. Plaintiff's case is governed by federal law, which holds that summary judgment is a final decision on the merits.

[6] Defendant also requests sanctions under 28 U.S.C. § 1927. To justify the imposition of sanctions under § 1927, defendant must demonstrate subjective bad faith. *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Defendant has not shown that the instant complaint was filed with subjective bad faith on the part of counsel. *See id.* ("[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent"). Defendant's request for § 1927 sanctions is therefore denied.

[7] There is no dispute that defendant complied with the "safe harbor" provisions of Rule 11. Fed. R. Civ. P. 11(c)(1)(A).

of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). However, the sanction imposed must be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2).

Defendant requests an award of $21,000 in attorneys' fees as a sanction, but does not provide an itemization of these fees to enable the court to determine whether the request is reasonable. At the hearing on these motions, plaintiff's counsel argued that an appropriate sanction, if the Court is inclined to impose one, is $2,500.

It is clear that the $1,000 sanction this Court imposed on plaintiff's counsel in *Sommer II* was insufficient to deter another frivolous action against the same defendant. The Court finds that a $2,500 sanction is sufficient deterrence. This amount is 150% more than the sanction imposed in *Sommer II*. In addition, the Court is persuaded by plaintiff's counsel statements in court that this amount would be an appropriate sanction. The Court finds that this sanction should serve as a deterrent to further frivolous litigation by plaintiff's counsel while not being unfair or overly punitive to plaintiff under the circumstances presented herein.[8]

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[8] The Court denies defendant's request for an order requiring prior court approval before plaintiff files any further claims and lawsuits (whether regarding the Wedbush policy or otherwise). There is no basis on this record for such a sweeping order.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment [# 6-1] is GRANTED and defendant's motion for Rule 11 sanctions [# 9-1] is GRANTED. Plaintiff's counsel shall pay defendant's counsel twenty-five hundred dollars ($2,500) as a sanction for filing a frivolous complaint. *Plaintiff shall make this payment on or before March 2, 2001.*

Defendant's request for sanctions under 28 U.S.C. § 1927 and for a "vexatious litigant" order are both DENIED.

IT IS SO ORDERED.

Dated: 1-3-01

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER P. SOMMER,
Plaintiff,
v.
UNUM LIFE INSURANCE,
Defendant.
_____/

No. C 00-01368 SBA
JUDGMENT
(Filed Jan. 8, 2001)

In accordance with the Court's Order granting Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED that final judgment is entered in favor of Defendant.

IT IS SO ORDERED.

Dated: 1-8-01

/s/ S B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge